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SANITARY LEGISLATION.

COURT DECISIONS.

ARKANSAS SUPREME COURT.

Sewage Disposal—Damages Allowed for Depreciation in Value of Land Caused by the Outlet from a Septic Tank Emptying into a Stream.

CITY OF EL DORADO et al. v. SCRUGGS, 168 S. W. Rep., 846. (June 1, 1914.)

The pollution of a stream by making it the outlet for a sewage-disposal system constitutes a damage to the land through which it flows for which compensation must be given by a municipality which causes the pollution.

The measure of damages to the owner of the land is the difference in its value before and after the effluent of the sewage-disposal plant was emptied into the stream.

A city is not liable in damages for injury caused by the wrongful act of its servants in unnecessarily flushing a septic tank, but it is liable for injury caused by the construction and proper operation of a sewage-disposal plant, including necessary flushing of the septic tank.

Plaintiff's dairy business was injured because his customers believed that his milk was impure by reason of his cows' drinking from a stream into which a septic tank emptied. The court held that injury to the dairy business could not be included as one of the elements in determining the amount of damage to his land.

L. J. Scruggs instituted this action in the circuit court against the city of El Dorado and sewer improvement district No. 1 of the city of El Dorado to recover damages for using a stream running through his land as an outlet to a sewer. The facts are as follows: Sewer improvement district No. 1 was organized in the city of El Dorado for the purpose of constructing a sewer. In the construction of the sewer a septic tank was erected. The tank is made of concrete, and is covered over and practically air-tight. The septic tank is located on lands purchased and owned by the defendants, and is situated more than 100 feet from the nearest point of plaintiff's land. It is 591 feet from his house. There is a stream of water which runs through the plaintiff's land, and the drainage from about one-fourth of the city of El Dorado is discharged into this stream. After the sewage is chemically treated in the septic tank, this stream of water is used as an outlet. It is about 340 feet from the place where the sewage is deposited in the stream, after leaving the septic tank, to the place where the stream enters plaintiff's land. It is 562 feet from where the sewage enters the stream to plaintiff's residence, on a straight line. The sewage when it enters the septic tank is chemically treated, and passes through a process of purification, and then comes out of the septic tank as a stream of water which seems to be perfectly clear, and is, according to the testimony of the defendants' witnesses, practically pure and odorless. According to the testimony of the plaintiff's witnesses, offensive odors arise from the septic tank, and the water which comes therefrom is not pure. The additional flow of water causes the stream through plaintiff's land to overflow, and sediment is deposited on the grass next to the bank of the stream. The plaintiff owned and operated a dairy, and the deposit of the sewage into the stream rendered the water unfit for his cattle to drink, and the sediment that was deposited on the bank when the stream overflowed

rendered the grass unfit for the use of the cattle until it had been purified by rain falling and washing it off. The odor from the septic plant was also offensive to the plaintiff and his family at their residence. Other facts will be referred to in the opinion. The jury returned a verdict for the plaintiff, and the defendants have appealed.

HART, J. (after stating the facts as above) : The concrete case we have to deal with is that a sewer improvement district was formed in the city of El Dorado, and when it was constructed the sewage was carried into a septic tank, where it was chemically treated, and from there was discharged in the form of water into a natural watercourse which ran through the plaintiff's land. The water was discharged into the stream which ran through plaintiff's land at a point about 500 feet distant from it. The plaintiff conducted a dairy on his land, and, according to the testimony adduced by him, the watercourse was polluted by the sewage being discharged into it so that it was rendered unfit for his cattle to drink. It was also shown by him that noxious and offensive odors emanated from the septic tank which were injurious to the health of himself and family. It was also shown that the discharge of the sewage into the stream caused it to overflow, whereby a sediment was deposited on the grass which grew near the banks of the stream on plaintiff's land, thereby rendering it unfit for grazing purposes until the sediment had been washed off by rains.

Our Constitution provides that private property shall not be taken, appropriated, or damaged without just compensation to the owner. In the case of *Hot Springs Railroad Co. v. Williamson* (45 Ark., 429), the difference between a constitution which contains this provision and one which contains a provision that private property shall not be taken for public use without just compensation was pointed out. The court said that it may be now taken as well settled that in a constitution which provides that private property shall not be damaged for public use without compensation, it is no longer necessary that there should be a physical invasion or spoliation of one's lands in order to give a right of recovery. In the application of this principle, in the case of *McLaughlin v. City of Hope* (107 Ark., 442; 155 S. W., 910; 47 L. R. A. (N. S.), 137), the court held that the turning of sewage by a municipal corporation into a stream, to the injury of a lower riparian owner of property, is within our constitutional provision (article 2, sec. 22) requiring compensation for damaging property for public use. The court further held that the damages to be awarded for the draining of sewage into a stream by the permanent plant of a municipal corporation should be assessed on the theory of a permanent taking under the right of eminent domain. The reason given is that the riparian proprietor is entitled to have the water of the stream flow through his land unpolluted and uncontaminated by the discharge of the sewage; and such right is held to be a real and tangible property right, and as much entitled to the protection of the constitutional provision as the right of the riparian owner to have the soil remain in its place. The right to have the stream flow through his land unpolluted is a part of the freehold of which the owner can not be deprived, except by due process of law. Therefore the pollution of the stream constitutes a damage to his property within the meaning of the constitutional guaranty, which may not be done without compensation.

In the present case the sewer improvement district constructed the sewer and discharged the sewage into the stream which flowed through the plaintiff's land; and this was a damage to his property by reason of the construction of the sewer, and the sewer district, and not the city, is liable in damages to the plaintiff therefor. It is true that when the sewer was completed it became subject to the control of the city of El Dorado, and the board of the sewer district no longer had control over it. (*Pine Bluff Water Co. v. Sewer District* (56 Ark.,

205; 19 S. W., 576.) It will be noted, however, that it was a part of the plan for the construction of the sewer that the sewage from the septic tank should be discharged into the stream which ran through the plaintiff's land. For this reason whatever damage the plaintiff may have suffered was an incident to the construction of the sewer. Therefore the city was not liable to him for the damages, but the sewer district alone was liable. The measure of damages to the plaintiff would be the difference in value of his land before and after the stream was used as an outlet to the sewer. (*Texas & St. Louis Ry. Co. v. Kirby*, 44 Ark., 103.) In determining the market value of the plaintiff's property, the rule, as established in this State, is that the owner may be allowed to show every advantage that his property possesses, present and prospective, in order that the jury may satisfactorily determine what price it could be sold for upon the market. (*Kansas City Southern Ry. Co. v. Boles*, 88 Ark., 533; 115 S. W., 375. See also, *Kansas City Southern Ry. Co. v. Anderson*, 88 Ark., 129; 113 S. W., 1030; 16 Ann. Cas., 784.) In the application of these principles to the present case it may be said, in estimating the damages that accrued to the plaintiff, he may show the value of his land for any purpose to which it was adapted at the time the damage was done to it, and in considering its value after the stream which ran through it had been polluted by the discharge of the sewage into it the jury might consider the fact that the stream had been polluted by the sewage; that an additional quantity of water had been discharged into the stream, which caused it to overflow and deposit a noxious or offensive sediment on the grass so as to render it unfit for grazing purposes, if the proof shows such to be the case; and also the further fact that noxious and offensive odors are emitted from the septic tank which are injurious to the health or comfort of the plaintiff and his family.

The proof on the part of the plaintiff tended to show that after the sewer was constructed and put in operation it was flushed frequently, and that the result of this flushing was to increase the pollution of the stream and also the offensive and obnoxious odors which were emitted from the septic tank. The evidence discloses, however, that it was not necessary to flush the septic tank oftener than once a year, or perhaps not that often. Therefore the damages suffered by the plaintiff by the wrongful flushing of the tank could not be recovered either against the sewer district or against the city. Such damage was not incident to the construction of the sewer, but resulted from the wrongful acts of those who operated the sewer. The sewer district could not be held liable for the negligence of its servants in constructing or operating the sewer. (*Wood et al. v. Drainage Dist. No. 2 of Conway County*, 161 S. W., 1057.) This court is also committed to the doctrine that a city is not liable for the torts or wrongful acts of its officers. (*Trammell v. Russellville*, 34 Ark., 105, 36, Am. Rep., 1; *Collier v. Fort Smith*, 73 Ark., 447, 84 S. W., 480, 68 L. R. A., 237; *Franks v. Holly Grove*, 93 Ark., 250, 124 S. W., 514, 137 Am. St. Rep., 86; *Gregg v. Hatcher*, 94 Ark., 54, 125 S. W., 1007, 27 L. R. A. (N. S.), 38, 21 Ann. Cas., 982.) Therefore the court erred in allowing a recovery on account of the wrongful acts of the officers of the sewer district or of the city in flushing the septic tank when it was not necessary to do so.

Of course, in estimating the damages that accrued to the plaintiff the jury might take into consideration all damages that were suffered by the plaintiff on account of the necessary flushing of the septic tank, for that would be a damage that would be incident to the construction and proper operation of the sewer.

The evidence of the plaintiff also shows that he operated a dairy on his farm at the time the stream was taken as an outlet for the sewer. His dairy business was not a part of the realty, and if the sewer district had instituted condemna-

tion proceedings against the plaintiff, it could not have condemned either the cows used by the plaintiff or his dairy business.

The evidence of the plaintiff also tended to show that he was unable to sell his milk because his customers believed that it was impure by reason of his cows drinking from the polluted stream. He was allowed to recover damages on this account. This was error. The injury to his dairy business was not an element to be considered in estimating the damage to his land. If his land was more profitable to be used in running a dairy than for any other use, its adaptability for that use might be considered by the jury in estimating the damages to his land by reason of the pollution of the stream, but the court could not allow as an element of damages to his land the loss he suffered in the business of operating a dairy. The jury could only consider the injury that resulted to his land, and, as above stated, in determining that fact, the plaintiff should be allowed to show any use to which his property was best adapted, and its depreciation in value by reason of the fact that the stream which ran through his land had been used as a permanent outlet for the sewer.

We have not taken up and discussed the assignments of error in detail, or in the order in which they are presented in the briefs, but we think the principles of law which we have announced are a sufficient guide for a retrial of the case.

For the errors indicated, the judgment must be reversed, and the cause remanded for a new trial.